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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 121

ALBERT BRACER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ALBERT BRACER,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Albert Bracer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 9, 1965.

Opinion Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 9, 1965 (Appendix hereto, *infra*). Mr. Justice Harlan, by order, has extended the time for filing a petition for a writ of certiorari in this case to and including May 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner was convicted of narcotics violations in a trial in which the Government introduced alleged written confessions taken from him while he was admittedly suffering from "withdrawal symptoms" as a narcotics addict. The Government also introduced narcotics seized from petitioner's home without any warrant, but on the claim that there was a "consent" which petitioner claims was given by him without understanding that he had any right to withhold the consent. Also, the "confessions" were extracted from petitioner in the absence of his counsel and without adequately warning him of his constitutional rights. And the "confessions" were admitted in evidence by the Trial Court without conducting a separate hearing out of the presence of the Jury on the issue of voluntariness. Finally, all of this evolved after an arrest of the petitioner without a warrant and, petitioner claims, without probable cause. The questions are:

1. Were the alleged confessions inadmissible because extracted from petitioner while he was suffering from narcotics withdrawal symptoms which mentally disabled him?

2. Was the nighttime search of petitioner's home, concededly not incident to any lawful arrest, justified by an alleged consent which petitioner uncontradictedly claims was given by him upon a misunderstanding (or rather upon *no* understanding) of his constitutional rights, and without being warned of such rights?

3. Was the extraction of the alleged confessions in the absence of any attorney for petitioner violative of his Sixth Amendment right to counsel?

4. Was petitioner denied his constitutional rights under the *McNabb* doctrine by being detained for an entire night and into the next morning and by being questioned during that time notwithstanding his manifest illness caused by deprivation of addictively required narcotics?

5. Was petitioner's warrantless arrest made upon probable cause, or upon "reasonable grounds" under 26 U.S.C. §7607?

6. Was petitioner denied his constitutional right to a separate hearing at his trial, out of the presence of the Jury, on the issue of the voluntariness of his alleged confessions?

7. In combination, and in their overall impact, do the circumstances of petitioner's arrest, subjection to search and seizure, prolonged detention and subjection to official interrogation while ill and in the absence of counsel, and denial of the right to a non-jury initial judicial determination of the voluntariness of his confession, vitiate the constitutionality of petitioner's conviction?

Constitutional Provisions, Statutes and Rule Involved

The case involves 21 U.S.C. §§173, 174 (narcotics violation); 26 U.S.C. §7607 (arrests etc. by narcotics agents etc.); and Rule 41(e) Fed. Rules Crim. Proc. (suppression of evidence). These provisions are printed in the Appendix hereto *infra*. The case also involves the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment

(due process of law) and the Sixth Amendment (right to counsel) of the United States Constitution.

Statement of the Case*

Petitioner Albert Bracer was convicted, after a jury trial in the United States District Court for the Southern District of New York (McLean, D.J.), on two substantive counts and one conspiracy count of narcotics violations under 21 U.S.C. §§173, 174 (8a, 39a). He was sentenced to seven years on each count, to run concurrently (39a). The United States Court of Appeals for the Second Circuit affirmed the conviction (Appendix hereto, *infra*).

The indictment, filed May 20, 1963, contained eight counts, of which petitioner was named in Counts Five, Six, Seven and Eight (the last count being for conspiracy) (8a). Two other defendants, Diego Torres and Richard Solero, were named in the indictment; they were convicted together with petitioner, but they evidently did not appeal their convictions. Count Five of the indictment was dismissed as to petitioner at the trial (3a). Counts Six and Seven, on which

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* " a" refers to the printed "Appellant's Appendix" in the Court below, nine extra copies of which are filed herewith. "G a" refers to the printed "Appendix for United States of America" in the Court below, of which nine extra copies are also filed herewith. Citations to non-printed portions of the Record on Appeal in the Court below—all such citations herein being to the typewritten stenographic minutes of the trial—appear herein as "Tr. ". The copy of those stenographic minutes which was docketed in the Court below is filed herewith. In addition, there is contained in the certified record filed herewith a stenographic transcript of a pretrial proceeding dated February 5, 1964 upon a motion by the within petitioner to suppress evidence, hereinafter cited as "Tr. Mot. Suppr. ".

petitioner was convicted, charged him alone with two similar substantive offenses both committed on April 10, 1963 in which the amounts of heroin involved were four grams and 340 grams, respectively (11a-12a); Count Six (the four grams) was based on a seizure of the heroin in Bracer's automobile incident to a warrantless arrest and search; Count Seven (the 340 grams) was based on heroin seized in Bracer's home later that same night in another warrantless search, there being dispute as to whether Bracer voluntarily consented.

Petitioner is admittedly a narcotics addict. Throughout this case it has been his contention, which we believe would not be seriously disputed by the Government, that his narcotics activity has not been of a direct monetary character, i.e., that aside from his possession of narcotics for his own personal use, his possession of narcotics belonging to other persons has been done by him as a service to such persons for which he was rewarded by being given narcotics for his own addictive requirements.

The narcotics investigation which led to the within indictment commenced around the end of March 1963 with dealings between the Bureau agents and the co-defendants Torres and Solero (G9a-14a, 25a). On April 1, 1963 the agents observed Solero go to an apartment building in the Bronx and enter an apartment which later was learned by the agents to be Bracer's, although it was not seen who if anyone admitted Solero to the apartment or who else was there (G27a; Tr. 382, 561-563). Shortly after this Solero returned to a rendezvous with a narcotics agent and delivered to him an ounce of heroin which he had promised in order to make up the full quantity of another delivery of

earlier that day (G18a, 24a, 27a). (In the trial herein, it was the Government's contention that Solero got this ounce of heroin from Bracer, but the Trial Court dismissed as to Bracer the count of the indictment relating to this transaction (Count 5), and it is evident that no case against Bracer had been proved as to that transaction.)

The next day, April 2, 1963, the agents found in the files of the Narcotics Bureau a reference to the apartment building and the apartment number where Solero had been seen to enter, and it appeared that Albert Bracer, who had a previous narcotics arrest, resided there; the agents also at that time looked at a photo of Bracer (G57a).

Later that same day (April 2, 1963) Agent Bailey ordered some more heroin from Solero (G20a). The next day Solero told Agent Bailey that everything was set and that he was going to meet his connection (G22a, 44a). Solero was then observed going to a location in the Bronx where he remained for a short while on the street when an automobile drove by and one of the agents recognized the driver of the car from the picture of Bracer seen in the office of the Narcotics Bureau the day before. Bracer and Solero were observed briefly moving about separately in that locality, Solero on foot and Bracer in his car, in what the Government claimed had the appearance of some sort of cautious effort to join each other (G29a-30a, 59a-62a). Solero then went back to join Agent Bailey whom he told that he had seen his connection but that the latter did not stop (G22a, 29a-30a, 60a-61a).

On April 8 the Agents arrested Solero, who then informed them that he had been obtaining heroin from Bracer (G63a).

The foregoing describes *all* of the information that the Government had "against" Bracer at the juncture last mentioned (the April 8 arrest of Solero). It is therefore of concern to note that the narcotics agents evidently at this juncture concluded, on the basis of this information, that they had sufficient probable cause to arrest Bracer without a warrant under the provisions of the narcotics legislation permitting warrantless arrests upon "reasonable" grounds to believe that the person to be arrested has committed or is committing such violation" (26 U.S.C. §7607).

The agents then waited two days—for reasons nowhere in the record explained—before arresting Bracer, which they did on April 10, 1964 when they intercepted him in his automobile at 10 P.M. at night on a city street, the arrest being carried out in a somewhat "gangbuster" kind of technique, involving a cutting off of Bracer's automobile by the agents' vehicle pulling in front of it, etc. (G23a, 49a, 53a; Tr. 280, 510-511). Bracer was accompanied in his automobile at the time by a nephew, a young boy (Tr. 280, 512-513). On searching Bracer's car, the agents found four grams of heroin—which is concededly a user's rather than a "seller's" quantity (Tr. 280-281, 282).

At this point in the history, there had come about as a result of the agents' conduct a by-no-means easy to justify warrantless arrest and a search incident thereto. And the legal situation was now shortly to become even more complicated as the agents pressed their physical advantage over Bracer whom they now were holding in his automobile under arrest.

From this point on in the chronology it becomes especially necessary to scrutinize with a critical mind the agents'

version of what occurred, inasmuch as we shall now be finding the agents not merely describing their own movements and observations, but their dealings with, their conversations with and their treatment of Bracer—obviously a subject matter that calls for critical evaluation in the light of the familiar due process and search-and-seizure controversies which so often tend to arise in cases of this sort. And we readily acknowledge that this task of critical evaluation is not made easier in cases where, like ours, the defendant has not taken the stand to testify in his trial or in his proceedings upon motion to suppress evidence, so that it becomes the task of the evaluational critic to discern the ultimate probable truth primarily from close examination of the version of the alleged events offered by the Government's police witnesses.

The materials in this record which are available for such an examination are the testimony of the agents in a pretrial proceeding upon a motion to suppress evidence, testimony of the agents at the trial which was taken on the question of admissibility of alleged confessions made by Bracer, and the texts of those alleged confessions.

We had reached the point above in the chronology where the agents had Bracer under arrest in his car and had seized in the car four grams of heroin. The agents now of course began questioning Bracer, particularly about additional heroin which the agents told him they knew he must have in his home (Tr. 64-65, 307-308).* Bracer expressed concern about being seen by people who knew him in the neighborhood where the agents were holding him, and

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* Solero when himself arrested on April 8, 1963 had told the agents that Bracer had a quantity of heroin in his home. (Tr. 277).

about getting his young nephew home; the agents then took him to a more secluded neighborhood (Tr. 64, 512). There then followed an interrogation, in the car, which apparently lasted at least one hour and may have lasted more, in which Bracer at first denied having heroin at his home and later admitted it (Tr. 64-65, 289-291). As the time was stretching on into a rather late hour of the night, and as the agents (according to their version) were saying to Bracer that they could get a search warrant to search Bracer's home and that this would involve going downtown and going through the necessary procedures, Bracer finally proposed, according to the agents, that he would voluntarily let them into his home and that they would not need a search warrant, all in the interests of avoiding commotion and undue disturbance of Bracer's pregnant young wife and elderly mother (Tr. 65, 394-397; Tr. Mot. Suppr. 980-982). They then went to Bracer's home, where the 340 grams of heroin were found and seized (Tr. 65, 70, 586-587). Circumstances denoting that the agents' velvet-glove approach to the question of a search warrant by no means excluded the mailed-fist, came to light in the admission of one of the agents that when they arrived at Bracer's home and the door was answered by the wife who said she had to go back inside to put on a robe, the agents immediately remonstrated with Bracer that if the wife was going back inside to dispose of heroin there would be trouble, and it was admitted also that the agents "may have" said they were going to break down the door to Bracer's apartment if necessary, Bracer assuring them however that his wife was not going back inside to destroy any evidence (Tr. Mot. Suppr. 976-977).

(In a statement taken from Bracer the following morning by an Assistant United States Attorney, and which we

take up in more detail *infra* in its place in this chronological sequence, Bracer said that he did not know at the time he agreed to let the agents come up to his apartment that he did not have to let them come up (G36a).)

After the search and seizure at Bracer's home, the agents put to Bracer a proposal that he should cooperate with them in making contacts for them with big suppliers of heroin, and the agents with Bracer in tow then went (still that same night) to a bar or to more than one bar where Bracer made telephone calls trying to locate the desired "contacts" (Tr. 308-310). During the course of these activities in the bars Bracer began to be ill, displaying what the agents acknowledged were in the nature of the withdrawal symptoms of a narcotics addict who is in need of a dose of narcotics; Bracer showed nausea and sweating, and the agents said he may have vomited in the bathroom at one of the bars (Tr. 294-295, 310, 515-516). Bracer's evident and intensifying physical distress by no means caused the agents to halt their efforts for that night, and instead they took Bracer downtown to the Narcotics Bureau headquarters at 90 Church Street in Manhattan, where they kept on further questioning him. He was put in a small detention cell where there may or may not have been a bed (the agents were not in agreement on this) and where in all likelihood he was kept handcuffed (Tr. 311-312, 330, 529). All this time his illness symptoms were naturally becoming more pronounced (Tr. 311, 323, 328, 524-527). During this middle-of-the-night ordeal at 90 Church Street the agents took from Bracer a typewritten two-page question-and-answer statement in which he admitted the inculpatory facts referred to *supra* (Tr. 312-313—printed in Appendix C, hereto, *infra*). From disparate testimony of the agents it appears that Bracer

may or may not have been given any nourishment during all of that night or during the next morning either (Tr. 339, 342, 530-531).

The next morning the agents took Bracer before an Assistant United States Attorney (Mr. Gold), where another statement was taken from Bracer and stenographically transcribed (Tr. 340-342; G34a). It was in this latter statement that Bracer said, as earlier herein mentioned, that he was not aware of his right to have refused to let the agents into his home (G36a).

Bracer was then released by a Commissioner on his own recognizance, evidently in the expectation of further cooperation (Tr. 344).

The arrest, the two searches, the night long Odyssey, the prolonged custodial detention of a worseningly sick narcotics addict deprived of his drugs, and the extraction from him of two detailed confessions, all were accomplished by the Government officers without benefit of formal process at any stage, i.e., the arrest and the searches and all the rest of the assertion and imposition of authority were warrantless, and there was no arraignment until after all of this.

Nor was Bracer given, at any point—until the Assistant United States Attorney came into the picture on the morning after the long night—any warning that he had a constitutional right to the assistance of counsel. Even the Assistant United States Attorney did not apprise Bracer of his right to counsel in a manner which met constitutional standards, it seems to us, for Mr. Gold merely said to Bracer "You are entitled to have an attorney, do you have

one?", to which Bracer replied "No", and that was the end of that, because Mr. Gold went on immediately to put questions to Bracer and to take down his answers (G34a). The agents and Mr. Gold did, in taking Bracer's written statements, warn him of his right to remain silent.

At the trial of this indictment the Government introduced in evidence against Bracer the heroin seized in his automobile and in his home, the two written confessions,* and testimony of the agents describing their conversations and their dealings with Bracer substantially along the lines hereinbefore described (Tr. 62-66, 280-285, 512-520, 602-605).

The Bracer defense had attempted, by a motion to suppress before trial, to exclude the heroin seized in Bracer's home; the motion was denied; the testimony of the narcotics agents in that motion proceeding was substantially along the lines of our above description with regard to the search and seizure at Bracer's home and the antecedent arrest (Tr. Mot. Suppr. 956-1008). At the trial the Bracer defense again challenged this evidence, it challenged also the confessions and the arrest and seizure in the automobile, and at the close of the trial all of these search and seizure contentions were renewed (Tr. 67, 602, 785-798).

One or two items remain to be mentioned by way of completing our above chronological description of the happenings prior to the trial: Evidently sometime later in April 1963 Solero recanted the confession or admission which he had given to the agents on April 8 and which, as

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* The confession to the agents was Ex. 21 in the trial (printed in the Appendix hereto, *infra;* the confession to the United States Attorney appears at G. 34a).

seen, had contributed to the agents' belief that they had additional justification to arrest Bracer on April 10 without a warrant (Tr. 185-186, 192). Solero took the stand in this trial, adhering to the recantation (Tr. 702-782). It was after this Solero recantation in April 1963 that the Government for the first time moved with formal process in this case, i.e., the defendants were indicted on May 20, 1963 (1a). It seems safe to surmise that the Grand Jury must have been given all or some of the "evidence" which the Government had secured against Bracer by the above described methods of utter "informality"; unfortunately the Bracer defense does not appear to have sought an inspection of the Grand Jury minutes.*

All of Bracer's contentions addressed to the arrest, searches and seizures were rejected in the trial and in the appeal in the court below. Those contentions, however, in several important respects noted *infra,* had not been presented on Bracer's behalf in the way that we are attempting to do in this petition for certiorari; and we hasten to say that we are only too painfully aware of the handicaps under which an application for certiorari must labor when this Court is being asked to take up issues that were not presented or that were differently formulated in the lower courts. We are frankly hoping that the points of constitutional aggrievement in this case may be deemed by this Court sufficiently fundamental to merit redress even at this lofty and late stage of review.

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* As we are shortly to mention, it is also unfortunate that several other points which we respectfully deem to have been available to Bracer at various stages before and during the trial, and in the appeal in the Court below, do not seem to have been raised or preserved on his behalf. This is something that is of concern both to Bracer's present counsel, and to his counsel in the courts below, with whom the matter has been discussed in a candid spirit.

Reasons for Granting the Writ

For the resolution of the questions of the constitutionality of the arrest, the searches, and the extraction of the confessions in this case, we respectfully suggest that the proper method of inquiry is that mentioned in *Rios* v. *United States*, 364 U.S. 253, 255, *viz.*, "a particularized evaluation of the conduct of the officers involved". Cf. the reference in *United States* v. *Rabinowitz*, 339 U.S. 56, 66 to "the total atmosphere of the case". The cumulation of constitutional wrongdoings by the Government's officers to which resort was had to send petitioner Albert Bracer to prison for seven years could supply the table of contents for a catalogue of classic Fourth-Fifth-and-Sixth Amendment violations. *First,* there was no probable cause for Bracer's warrantless arrest—because the agents had nothing except (a) the surveillance of Solero on April 1, 1963 involving the Bracer apartment (an item later found insufficient as a matter of law by the Trial Court to sustain a charge against Bracer based thereon), (b) the word of Solero that he was going to meet his contact on April 2, 1963 and the surveillance of Solero and Bracer *not* joining up with each other on that occasion, (c) the Narcotic Bureau's file reference to Bracer as having had an apparently not-too-notable prior narcotics incident, and (d) the post-arrest accusation against Bracer by Solero on April 8, 1963 *which Solero subsequently recanted**. *Second,* there is no explanation why the agents waited two days before arresting Bracer after their "probable cause" was ostensibly complete, i.e., they had ample time to get an arrest warrant. *Third,* the agents evidently contrived to stage the Bracer arrest under

* What a model example of a "reliable informant"!

conditions that would give them an initial psychological advantage and ostensible legal need for an "emergency" search, i.e., a nighttime arrest of the suspect while driving in a motor vehicle. *Fourth,* the agents pressed their psychological advantage of thus throwing Bracer into demoralization, by maneuvering him into a "consent" to search his home without a warrant and in the nighttime. *Fifth,* the agents then put Bracer through a night of refined torture which yielded two "confessions".

Where shall one begin in an effort to "cite the cases" whose enunciation of Fourth-Fifth-or-Sixth Amendment principles were flouted here? Need one go beyond *Giordanello* v. *United States,* 357 U.S. 480, 485-486 on the issue of probable cause to make the arrest? Or beyond *Jones* v. *United States,* 357 U.S. 493, 498-499 and *Johnson* v. *Zerbst,* 304 U.S. 458 on the issue of the nighttime search of a private dwelling with "consent"? Or beyond *McNabb* v. *United States,* 318 U.S. 332 plus *Escobedo* v. *Illinois,* 378 U.S. 478 on the issue of the prolonged detention with its harvest of "confessions" from a prime suspect who did not have counsel and who, at least in connection with the first confession, was not even warned of his right to counsel? Or beyond *Townsend* v. *Sain,* 372 U.S. 293, on the issue of Bracer's state of physical and mental health at the times in question in view of his narcotics-withdrawal symptoms?

Unfortunately, as earlier mentioned, much of our formulation given in the above paragraph was not presented to the Courts below on Bracer's behalf. The Bracer contentions on these constitutional issues in the Courts below did not go beyond challenging the legality of the warrantless arrest for lack of probable cause, the constitutional effectiveness of the "consent" to the nighttime search of

Bracer's apartment, and a rather indistinct contention that the Bracer confessions may not have been voluntary. The *McNabb* (delayed arraignment) contention and the *Escobedo* contention were not advanced on Bracer's behalf—*Escobedo,* at any rate, had not been decided before the instant trial ended, although the point was available for the appeal in the Court below.

Still another point which was available to Bracer in the lower Courts but was not raised, and which we have not previously mentioned in this petition, is that the examination of the narcotics agents at the trial on the issue of the voluntariness of the alleged confessions was conducted in the presence of the Jury, i.e., without regard for the principle of *United States* v. *Carignan,* 342 U.S. 36 and *Smith* v. *United States,* 348 U.S. 147, 151. It is unfortunately true also, that Bracer's trial counsel did not invoke this principle at the trial. Still, we feel obliged to, and we do urge with all earnest respectfulness, that this point is so fundamental as to merit the Court's attention even at this tardy stage, in view of the predominant policy importance with which the Court endowed the principle in question in *Jackson* v. *Denno,* 378 U.S. 368.

We are quite uncomfortably aware that from the standpoint of appellate procedure and of the understandable policy of jurisdictional frugality which controls this Court's administration of its certiorari discretion, we are "asking a lot" in requesting this Court to consider our above mentioned certiorari contentions in their entirety rather than as limited by that which was raised in the lower courts. It does seem to us, however, that petitioner Albert Bracer has not thus far had the benefit of a well-apprised judicial con-

sideration of the really rather extraordinary governmental investigative procedures without which he could not have been convicted and sentenced in this case. We trust it is not improper to suggest that a grant of certiorari in this case at this stage would be in *everyone's* ultimate interest because it would avoid the necessity of the laborious proceedings under 28 U.S.C. §2255 to which Bracer would alternatively be obliged to resort in order to obtain, at last, judicial consideration of the entirety of the unusual complex of constitutional improprieties which he asserts.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Petitioner

SAMUEL SEGAL
Of Counsel

(Appendices follow)

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 325—September Term, 1964.

(Argued January 27, 1965 Decided March 9, 1965.)

Docket No. 29364

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALBERT BRACER,

Defendant-Appellant.

Before:

WATERMAN, SMITH and ANDERSON,

Circuit Judges.

Appeal from judgment on conviction after trial to the jury in the United States District Court for the Southern District of New York, Edward C. McLean, *District Judge,* on two counts of violation of 21 U. S. C. §§173-174 and one count of conspiracy so to do. Affirmed.

PHILIP SEGAL, New York, N. Y. (Samuel Segal, New York, N. Y., on the brief), *for defendant-appellant.*

R. HARCOURT DODDS, Asst. U. S. Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and

Jack D. Samuels, Asst. U. S. Attorney, So. District of New York, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

After a trial by jury in the United States District Court for the Southern District of New York, McLean, *J.*, the appellant Bracer was found to have violated 21 U. S. C. §§173-174 by receiving, concealing, selling, and facilitating the transportation, etc., of approximately 4 grams and 340 grams of heroin on two separate occasions on April 10, 1963, and to have conspired with co-defendants Torres and Solero to violate §§173-174. He received concurrent 7-year sentences on all counts. Bracer was arrested without a warrant on April 10, 1963 following the arrest on April 8 of Solero, who informed the agents that he had been obtaining his heroin from Bracer. At the time of his arrest, Bracer's car was searched and a package of heroin discovered on the floor, and while being interrogated Bracer volunteered to the arresting agent that he had additional heroin stored in his apartment. Bracer then consented to a search of his apartment. Bracer now contends that the search of his home was without his consent and hence unlawful, that his arrest without a warrant was illegal, in that probable cause was lacking, and that the heroin obtained at the time of his arrest was hence inadmissible evidence, and that there was insufficient evidence to support the conspiracy conviction. He has failed to demonstrate error on either of the substantive counts, and we affirm the judgment on the substantive counts. We do not reach the conspiracy count.

In the first place, the arresting agent Bailey had probable cause to make the arrest and to search Bracer's automobile. The evidence outlined below, obtained through the agents' surveillance showed to a high degree of probability that the appellant was an integral part of the distribution scheme and further served to substantiate Solero's claim that Bracer was the source. When, on April 1, Solero ventured out to obtain an additional ounce of heroin for Bailey who was acting as a purchaser, Solero was seen by the agents to proceed directly to Bracer's apartment and to return immediately to Bailey with the additional heroin. Furthermore, the files of the narcotics bureau showed that Bracer had previously been convicted for a narcotics violation, and information Bailey had received from a fellow agent disclosed that appellant was engaged in the narcotics trade. Finally, on April 3, Solero told Bailey that he was going to meet his connection. Agents watching Solero then saw him proceed to a street corner in the Bronx where, after waiting a short while, he twice motioned to Bracer who drove past him on two different occasions without stopping; and, when Solero returned to Bailey, he told Bailey that he had just seen his connection, but that his connection for some reason did not stop.

26 U. S. C. A. §7607 empowers a narcotics officer to make arrests without a warrant for violations of the narcotics laws when he has "reasonable grounds to believe that the person to be arrested has committed or is committing such violation." "Reasonable grounds" is construed to mean probable cause, and probable cause is defined to mean more than mere suspicion, but not that the arresting officer be in possession of evidence sufficient to result in the con-

viction of the suspect—it requires evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed. *Wong Sun* v. *United States,* 371 U. S. 471, 479 (1963). Whether there was probable cause for the arrest is held to be a factual determination depending on the particular facts of the case. See *United States* v. *Williams,* 336 F. 2d 183 (2 Cir. 1964); *United States* v. *Wai Lau,* 329 F. 2d 310 (2 Cir. 1964). The facts here plainly presented such reasonable grounds for Bracer's arrest. In *United States* v. *Smith,* 308 F. 2d 657 (2 Cir. 1962), cert. den. 372 U. S. 906 (1963), this court held that probable cause existed for the defendant's arrest where an informer said he had bought from her, she had been observed meeting the informer, the description given agents by the informer proved to be correct and she appeared at the appointed time and place at which a sale of narcotics was to be made to an undercover agent. If the court in *Smith* was able to find sufficient reliable evidence, additional to the word of the narcotics peddler, to establish the requisite probable cause, then clearly there was probable cause for arresting Bracer whose activities were scrutinized at least as closely as Smith's.

Bracer next contends that the search of his home was without his consent and hence unlawful. According to the Government, after the agents arrested Bracer, they informed him that they would have to obtain a search warrant in order to search his apartment. Bracer, it was claimed, then freely consented to such a search and led two agents to his apartment where an additional supply of heroin was uncovered. At trial, appellant moved to suppress the evi-

dence thus obtained on the ground that he had withdrawn his consent upon reaching his apartment door.

The trial court denied the motion to suppress, finding that the search was conducted by the agents with the consent and approval of Bracer. While it is true that the Government has the burden of proving by clear and positive evidence that such consent was given, *Channel* v. *United States,* 285 F. 2d 217 (9 Cir. 1960), the finding whether the consent was voluntarily given is a finding of fact that should not be lightly overturned by the appellate court. Here, there was evidence that after the agents told Bracer that they were going to get a search warrant for his apartment, he volunteered to take them to the apartment if only two agents would go along, so as not to frighten his wife and mother, that Bracer told his wife to let them in and that she did so, whereupon Bracer led the agents to the cabinet containing the heroin. Moreover, the situation presented here bears a striking resemblance to that of *United States* v. *Smith, supra.* In both cases the defendant was arrested while in the possession of narcotics and prior to the obtaining of consent for the subsequent search, and the consent was with knowledge that the agents could and would obtain a warrant, quite unlike the search before the arrest issue posed by *United States* v. *Como,* —— F. 2d ——, 2 Cir., January 26, 1965, slip opinion pp. 957, 960. The denial of the motion to suppress was correct. The judgment of conviction is affirmed.

APPENDIX B

Judgment Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DIEGO TORRES,
ALBERT BRACER,

Defendants-Appellants,

RICHARD SOLERO,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment Sought to be Reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

APPENDIX C

Trial Exhibit 21—Alleged Confession to Narcotics Agents

(See also G34a for Alleged Confession to U.S. Attorney)

This statement taken in the presence of Agent James S. Bailey and John F. Kreppein from the defendant Albert Bracer.

Q. Mr. Bracer, I wish to advise you of your constitutional rights in that anything you say might be held against you. Do you understand.

A. Yes.

Q. You were arrested last night being April 10, 1963.

A. Yes.

Q. Would you describe what happened when you were arrested.

A. You said anything I said would be held against me . . . so . . .

Q. I'm only asking what happened when you were arrested. You got into the car about 10:00 P.M. didn't you.

A. Yes.

Q. How much stuff did you have.

A. About a $5.00 bag.

Q. Did you notice the Agents approaching the car.

A. No not right away.

Q. Did you throw the stuff on the floor.

A. Well it was on the floor already before I even saw you.

Q. Did you give us permission to search your house.

A. No.

Appendix C—Trial Exhibit 21—Alleged Confession to Narcotics Agents

Q. Isn't it true that you said there was heroin in your apartment and that there were people there, your wife and mother.

A. That's right.

Q. Did you offer to let us look around your apartment.

A. Well I offered you the heroin but there was still searching going on beside that.

Q. Weren't you asked in the car if you had heroin in the house.

A. Yes.

Q. Didn't you say that you had a couple of bags.

A. Yes.

Q. And then weren't you asked how much was a couple of bags.

A. Yes.

Q. And wasn't your answer a couple of ounces.

A. Yes.

Q. How much heroin was actually in the house.

A. 12 ounces.

Q. Weren't you asked where the heroin was in the house.

A. Yes.

Q. And didn't you reply that it was in the kitchen cabinet and asked us not to mess the apartment while searching.

A. Yes.

Q. And didn't you take us up to your apartment voluntarily.

A. Yes.

Appendix C—Trial Exhibit 21—Alleged Confession to Narcotics Agents

Q. Did you give the heroin to us.

A. Yes.

Q. Did you make this statement voluntarily and of your own free will. Did anyone force you.

A. No.

/s/ ALBERT BRACER
Albert Bracer

Witnessed by:

/s/ JAMES S. BAILEY
James S. Bailey

/s/ JOHN F. KREPPEIN
John F. Kreppein

APPENDIX D

Statutes and Rule Involved

TITLE 21, SECTION 173, UNITED STATES CODE

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* —It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any

narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 615; Jan. 17, 1941, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, SECTION 174
UNITED STATES CODE

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

[For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, Title I, §105, 70 Stat. 570.)]

Title 26, Section 7607
United States Code

Additional authority for Bureau of Narcotics and Bureau of Customs

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C. sec. 1401 (1)), may—

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

(2) make arrest without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is commiting such violation.

(Added July 18, 1956, ch. 629, title I, §104(a), 70 Stat. 570)

Appendix D—Statutes and Rule Involved

RULE 41
FED. RULES CRIM. PROC.
SEARCH AND SEIZURE

* * * *

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds upon which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *